Supreme Court, U.S.
FILED
AUG 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-155

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1987

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Petitioner

v.

LIEUTENANT THOMAS CUMMINGS, *et al.*,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Alexander A. Di Santi*
John M. Gallagher, Jr.
RICHARD, DI SANTI, HAMILTON, GALLAGHER & PAUL
25 West Second Street
P.O. Box 900
Media, Pennsylvania 19063
(215) 565-4600
Counsel for Respondents

**Counsel of Record*

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED

Do state courts have jurisdiction to award money damages to railroad employees for breach of promises which were made to them by the railroad while they were employed elsewhere and which induced them to leave their previous employment and become employees of the railroad?

Does the Railroad Adjustment Board's denial of a grievance seeking specific performance of such promises, on the ground that it was improper for the railroad to extend them because they were in conflict with a collective bargaining agreement governing the railroad, preclude a state court from awarding money damages to the individuals harmed by the railroad's breach of such promises?

TABLE OF CONTENTS

	Page
Statement of Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Counter-Statement of the Case	2
Reasons Why Petition Should be Denied	6
1. The decision below of the Pennsylvania Supreme Court did not impinge upon the exclusive jurisdiction of the Railroad Adjustment Board	6
2. The court below adjudicated claims separate and apart from those which the Railroad Adjustment Board had considered and rejected	11
3. The test for pre-emption applied by the Pennsylvania Supreme Court was consistent with that announced in *Allis-Chalmers v. Lueck*	14
4. In determining that the individual contracts of employment extended to Respondents by Amtrak were separate from the collective bargaining agreement and were thus "outside of the collective bargaining agreement's scope" and "do not affect it," the Pennsylvania Supreme Court correctly relied upon *Belknap, Inc. v. Hale* to support the viability of Respondents' claims under the common law of Pennsylvania	17
5. There is no conflict among the circuit courts and the state courts on the issue presented by the case at bar	20
Conclusion	26

TABLE OF AUTHORITIES

Cases: Page

Allis-Chalmers v. Lueck, 471 U.S. 202 (1985) 14, 15, 16, 22, 25

Anderson v. Ford Motor Co., 803 F.2d 953 (8th Cir. 1986) 15, 22, 25

Andrews v. Louisville & Nashville R., 406 U.S. 320 (1972) 10, 11, 16

Bale v. General Telephone Co. of California, 795 F.2d 775 (9th Cir. 1986) 25

Beers v. Southern Pacific Transp. Co., 703 F.2d 425 (9th Cir. 1983) 10, 11

Belknap, Inc. v. Hale, 463 U.S. 491 (1983) 6, 7, 13, 17, 18, 22

Brown v. American Airlines, Inc., 593 F.2d 652 (5th Cir. 1979) 24

Bubbel v. Wien Air Alaska, Inc., 682 P.2d 374 (Alaska 1984) 22

Caterpillar, Inc. v. Williams, U.S. , 107 S.Ct. 2425 (1987) 18, 19, 20, 21

Choate v. Louisville & Nashville R., 715 F.2d 369 (7th Cir. 1983) 10, 11

Edelman v. California, 344 U.S. 357 (1953) 12

Eitmann v. New Orleans Public Service, 730 F.2d 359 (5th Cir.), *cert. den'd*, 469 U.S. 1018 (1984) 22, 23, 24

Elgin, Joliet & Eastern Ry. v. Burley, 325 U.S. 711 (1945) 8

Goclowski v. Penn Central Transp. Co., 571 F.2d 747 (3d Cir. 1977) 9, 10, 11, 13

Illinois v. Gates, 416 U.S. 213 (1983) 14

J.I. Case v. NLRB, 321 U.S. 332 (1944) .. 6, 8, 18, 19, 20, 21

TABLE OF AUTHORITIES—(*Continued*)

Cases: Page

Lewellyn v. Fleming, 154 F.2d 211 (10th Cir.), *cert. den'd*, 329 U.S. 715 (1946) 21, 22, 24

Magnuson v. Burlington Northern Inc., 576 F.2d 1376 (9th Cir.), *cert. den'd*, 439 U.S. 930 (1978) 15

McKinney v. International Association of Machinists, 624 F.2d 745 (6th Cir. 1980) 22, 24

Moore v. Illinois Central R.R., 312 U.S. 630 (1941) 10

Order of Railway Conductors of America v. Pitney, 326 U.S. 561 (1945) 9

Pennsylvania R.R. v. Day, 360 U.S. 548 (1959) 7

Posternack v. American Cas. Ins. Co. of Reading, 421 Pa. 21, 218 A.2d 350 (1966) 12

Saitta v. Bankers Indemnity Ins. Co., 172 Pa. Super. 641, 95 A.2d 375 (1953) 12

Slimbock v. National Railroad Passenger Corp., No. 78-1662 (E.D. Pa.) 4

Slimbock v. National Railroad Passenger Corp., No. 76-3840 (E.D. Pa.) 4

Slocum v. Delaware, Lackawanna and Western R.R. Agency, 339 U.S. 239 (1950) 7, 8, 9, 10, 13

Union Pacific R.R. v. Sheehan, 439 U.S. 89 (1978) 7

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1970) 23

Varnum v. Nu-Car, 804 F.2d 638 (11th Cir. 1986) 22

Williams v. Caterpillar Tractor Co., 786 F.2d 928 (9th Cir.), *aff'd sub. nom. Caterpillar, Inc. v. Williams*, U.S. , 107 S.Ct. 2425 (1987) 25

TABLE OF AUTHORITIES—(*Continued*)

Statutes:	Page
29 U.S.C. §185(a)	14
45 U.S.C. §501 *et seq.*	2
45 U.S.C. §51 *et seq.*	8
45 U.S.C. §701 *et seq.*	2
Rules of Court:	
Pa. Rule of Civil Procedure 1030	11
Pa. Rule of Civil Procedure 1032	11
Other Authorities:	
Restatement, Judgments 2d §26(1)	13
Restatement, Judgments 2d §27	14
Restatement, Judgments 2d §83(1)	13

NO. 87-155

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1987

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Petitioner

v.

LIEUTENANT THOMAS CUMMINGS, *et al.*,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The Respondents, Lieutenant Thomas Cummings, Lieutenant John Gallagher, Lieutenant Ronald Stachowski, Lieutenant William Boland, Lieutenant Stephen McGovern, Lieutenant John Ryan, Lieutenant Kurt Kemmessies, Lieutenant Michael Amico, Sergeant Neville Booth, Lieutenant Michael Serfess, Lieutenant Lawrence Clark, Lieutenant John Riggin, Lieutenant Harold Plude, Lieutenant Robert Slimbock, Lieutenant Harry Halbe, Lieutenant John Griffin, Sergeant Vaughn Carver, Sergeant Charles Yager, Sergeant Gerald Adams, Sergeant Stephen Warner, Sergeant Carl Gustafson, Sergeant

Richard Yost, Sergeant Robert Crowley, Sergeant Frank Rapinesi and Sergeant Robert Coulson, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the Pennsylvania Supreme Court in this case.[1]

COUNTER-STATEMENT OF THE CASE

Respondents instituted a simple breach of contract action against Amtrak in the Court of Common Pleas of Delaware County, Pennsylvania. Following trial, verdicts were rendered for Respondents in which the trial court determined that Amtrak had entered into individual employment contracts with each of the Respondents, that it had breached those contracts, and that as a result Respondents had sustained losses in the aggregate amount of approximately $800,000.00

Amtrak was created by the Rail Passenger Service Act[2] of 1970. In 1976, in connection with the exercise by Conrail of its statutory option[3] to purchase properties from the trustees of the bankrupt Penn Central Railroad, Amtrak assumed responsibility for operating and maintaining passenger service on those properties. It found itself with a sudden and immediate need for an appropriate railroad police force, including supervisory officers.

There were two pools of potential supervisory police personnel, the first comprised of individuals employed by railroads whose operations had been assumed by Amtrak and the second comprised of individuals outside the railroad industry.

Congress provided in the Regional Rail Reorganization Act of 1973, 45 U.S.C. §701 et seq., that rank-and-file employees who transferred to Amtrak from other rail carriers would be deemed covered by the collective bargaining agreements in effect on the railroad properties from which they transferred. In the case of Amtrak's railroad police, the governing collective

---

1. The titles preceding the names of the Respondents represent the ranks promised to them and held by them before they were demoted by Amtrak.

2. 45 U.S.C. §501 *et seq*.

3. The option was provided in the Regional Rail Reorganization Act of 1973, 45 U.S.C. §701 *et seq*.

bargaining agreement was the one negotiated between Amtrak's remote predecessor, the Penn Central Transportation Company, and the Teamsters Union. It provided for the supervisory ranks of lieutenant and sergeant to be filled through a promotional scheme which gave decisive weight to seniority among competing employees who established their eligibility for promotion by passing a simple pass-fail examination.

Respondents held prestigious positions in law enforcement outside the railroad industry[4]. The testimony before the trial court demonstrated that they were recruited and hired by Amtrak personnel who were themselves advised by Amtrak that special arrangements had been made to bypass the promotional scheme in the governing collective bargaining agreement for the purpose of hiring the initial complement of lieutenants and sergeants. The Amtrak recruiters who solicited the Respondents as lieutenants and sergeants promised them permanent positions in these offices, subject only to good behavior. Those among the Respondents who inquired about any applicable collective bargaining agreement were told, as the Amtrak recruiters had themselves been advised, that special arrangements had been made to permit them to be hired as lieutenants and sergeants.

Respondents terminated their previous positions and gave up significant benefits attendant thereto in reliance upon the employment offers extended by Amtrak. They began working for Amtrak in the supervisory positions for which they were hired by it. A few months after being hired, Respondents were informed by Amtrak that, contrary to their individual contracts of hire, their eligibility for the supervisory positions they occupied would be determined by a promotional examination to be conducted in accordance with the governing collective bargaining agreement. All of the patrolmen who had joined Amtrak by transferring from another rail carrier brought with them the seniority they had acquired with that other rail carrier,

---

4. For example, Respondent Amico had been a special agent for the Federal Bureau of Investigation. Respondent Yost was in charge of security for the DuPont Company in Delaware. Respondent Plude was on the list for promotion to captain in the New York City Police Department.

so that they all had seniority greater than Respondents. Learning that by the terms of the Teamsters-Penn Central collective bargaining agreement any patrolmen who passed the test would be promoted before them, Respondents recognized the futility of participating in that promotional scheme.[5] The promotional exam was temporarily delayed by litigation instituted by Respondents in the United States District Court for the Eastern District of Pennsylvania.[6] Eventually, however, Respondents, who refused to participate in the examination, were notified they would be demoted on May 18, 1978. Respondents then instituted a separate action in the United States District Court for the Eastern District of Pennsylvania at No. 78-1662, in which they sought to enjoin Amtrak from demoting them. Judge McGlynn on May 16, 1978 dismissed Respondents' Complaint on the basis that their right to occupy the supervisory positions they held represented a "minor dispute" within the exclusive jurisdiction of the RAB. Respondents were then in fact demoted from the supervisory offices they occupied to the rank of patrolman. Respondents thus found themselves in the untenable position of being suddenly made subordinate to officers whom

---

5. When the test was ultimately given, more than enough patrolmen passed it than were necessary to fill all of the promotional positions available, establishing that Respondents had in fact no chance to successfully compete with them for the promotional positions.

6. In this litigation, *Slimbock v. National Passenger Corp.*, No. 76-3840, Judge McGlynn issued an injunction in December, 1976 prohibiting Amtrak from implementing the promotional scheme provided in the interim Teamsters-Penn Central collective bargaining agreement in order to preserve the status quo during the pendency of proceedings before the National Mediation Board brought by Respondents to challenge the status of the Teamsters as the collective bargaining representative for the Amtrak Police. Those proceedings culminated in the decertification of the Teamsters as the collective bargaining representative, following which a representation election was conducted which resulted in the Patrolman's Benevolent Association being certified as the bargaining representative. In the election, it had defeated both the Teamsters and the Amtrak Police Association, a labor organization sponsored mainly by Respondents. The Mediation Board's certification terminated the injunction jurisdiction of the District Court, and Judge McGlynn on April 27, 1978 entered an Order dissolving the injunction and dismissing the case for lack of subject matter jurisdiction.

they had supervised for approximately two years and who had no supervisory experience whatever.

Respondents then initiated grievances pursuant to the collective bargaining agreement in which, as ultimately noted by the National Railroad Adjustment Board (hereinafter RAB),

> "[Respondents] claim[ed] entitlement to reinstatement into the supervisory positions which they formerly held, with full reimbursement for all back pay that they have lost as a consequence of their demotion."

The grievances ultimately were denied by the RAB.[7] In denying their grievances and refusing to reinstate Respondents to their supervisory positions, the RAB in no way questioned the validity of Respondents' individual contracts of hire with Amtrak and did not address the responsibility of Amtrak toward Respondents occasioned by any breach of those individual contracts of hire. The RAB simply held that a carrier cannot properly enter into individual employment contracts which are inconsistent with the provisions of a collective bargaining agreement so that, in determining Respondents' claim to occupy the supervisory positions in question, the RAB was obliged to recognize that the rights of the bargaining unit membership established by the underlying collective bargaining agreement must take precedence over the rights of the Respondents under their individual contracts of hire.

The instant action had been instituted and was pending during the course of the proceedings before the RAB. It proceeded to a non-jury trial before the Honorable Joseph T. Labrum, Jr., Judge after the RAB had rendered its awards. Specifically finding that Amtrak had entered into contracts of employment with each of Respondents providing them with permanent supervisory positions terminable only for just cause and that Amtrak had breached each of those contracts of

---

7. For reasons not difficult to comprehend, the Patrolman's Benevolent Association, the union then representing the Amtrak police force, refused to represent Respondents before the RAB.

employment by demoting Respondents, Judge Labrum entered verdicts for the Respondents and against Amtrak.

In post-trial exceptions to the verdict, Amtrak for the first time asserted that the case at bar was not within the subject matter jurisdiction of the state court. As a result, Judge Labrum entered judgment n.o.v. in favor of Amtrak.

Following affirmance of the trial court's judgment by a three-judge panel of the Pennsylvania Superior Court, the case at bar proceeded before the Pennsylvania Supreme Court which, sitting *en banc*, unanimously reversed the order of the Superior Court and reinstated the verdicts in favor of Respondents.

REASONS WHY PETITION SHOULD BE DENIED

1. The decision below of the Pennsylvania Supreme Court did not impinge upon the exclusive jurisdiction of the Railroad Adjustment Board.

Respondents' claim to reinstatement to the supervisory positions occupied by them pursuant to their individual contracts of hire was concededly a matter within the jurisdiction of the RAB. This conclusion follows from the obvious fact that resolution of those claims required establishing the priority of their claims pursuant to their individual contracts of employment against the competing claims of the other members of the bargaining unit pursuant to the terms of the collective bargaining agreement. However, while the jurisdiction of the RAB is exclusive, it is not exhaustive.

In making its argument on this point, Petitioner fails to recognize the crucial distinction, recognized by this Court [*Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944)], between a claim seeking specific enforcement of an individual contract of employment inconsistent with a collective bargaining agreement (which would incidentally impact adversely upon the competing rights of other employees within the bargaining unit as provided in the collective bargaining agreement) and a claim seeking only money damages for the financial loss suffered by the employee as a

result of his employer's breach of the terms of his individual contract of employment. The federal interest in reducing friction in the railroad industry centers upon disputes which require interpretation of a collective bargaining agreement, where their resolution affects and governs future relations between the parties and serves as precedent in construing other collective bargaining agreements. *United Pacific R.R. v. Sheehan*, 439 U.S. 98, 95 (1978); *Slocum v. Delaware, Lackawanna & Western R.R.*, 339 U.S. 239, 242 (1950). To further implement this interest, Congress created the RAB and entrusted it with jurisdiction of such disputes. As stated in *Slocum*, 339 U.S. at 243:

> "The act . . . represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing [collective bargaining] agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. . . . Precedents established by it . . . provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems."

To the same effect, see *Pennsylvania R.R. v. Day*, 360 U.S. 548, 551 (1959).

Analogous to *Belknap, Inc. v. Hale, supra*, at n.13, the Pennsylvania courts could not, without interfering with the exclusive jurisdiction of the RAB, mandate specific performance of the individual contracts of employment made with Respondents by granting injunctive relief requiring reinstatement to their supervisory positions. The relief granted to Respondents, however, in the form of simple money damages, in no way involves interpretation of the collective bargaining agreement, in no way impacts upon any present or future relations between the railroad and its employees, and in no sense interferes with the federal interest in promoting uniformity in the interpretation of collective bargaining agreements and preserving the

integrity of the railroad system which prompted enactment of the Railway Labor Act.

Respondent's entitlement to compensatory damages for the losses suffered by them by virtue of Amtrak's breach of their individual contracts of employment is completely separate and apart from those issues within the exclusive jurisdiction of the RAB, "and does not involve questions of future relations between the railroad and its other employees". *Slocum*, 339 U.S. at 244.[8] As stated analogously by this Court in *J.I. Case v. NLRB*, arising under the National Labor Relations Act and involving the National Labor Relations Board:

---

8. Amtrak's quotation from *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723 (1945) that the jurisdiction of the RAB extends to any claim "founded upon some incident of the employment relationship," including those "independent of a collective agreement," must be read in the factual and historical context of that case. The issue there was in no way related to the question here involved, but rather concerned the extent of a collective bargaining representative's authority to take action binding its members without their consent. Justice Rutledge painted the difference between a "major dispute" and a "minor dispute" in broad brushstrokes in this context, indicating that in the former case, involving the negotiation and formation of collective bargaining agreements, the representative *ipso facto* possessed authority from its individual members. His opinion placed all other disputes in the category of "minor disputes," involving the resolution of rights already accrued, and held that the bargaining representative needed authorization from the employees involved to compromise such disputes. No question of the jurisdictional dichotomy between courts and the RAB was involved in that case and the Court was entirely unconcerned with any such jurisdictional question, for at the time *Elgin* was decided, it was not established that the RAB had exclusive jurisdiction which would operate to deprive a court of jurisdiction. To the contrary, *Slocum v. Delaware, Lackawana & Western R.R.* was not decided until 1950. That Justice Rutledge, in defining "minor disputes", was totally unconcerned with the category of cases over which the RAB had jurisdiction, is apparent from the fact that his one illustration of a "minor dispute" independent of those covered by a collective bargaining agreement, *viz.* personal injuries, has never been within the jurisdiction of the RAB and has always been subject to jurisdiction of the courts, presently and since 1908 by virtue of the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.*

"The Board, of course, has no authority to adjudicate the validity or effect of . . . contracts except as to their effect on matters within its jurisdiction."

The award of damages sought by Respondents in the case at bar, based upon the losses suffered by them as a result of Amtrak's breach of its contractual promises to them while they were total strangers to Amtrak and before they became subject to the collective bargaining agreement which the RAB determined foreclosed specific performance of those promises, "differs from any remedy which the Board has power to provide." *Slocum v. Delaware, Lackawanna & Western R.R.*, 339 U.S. at 244. The law governing the resolution of Respondents' claims" is ordinary common law," and since "no interpretation of any provisions of any collective bargaining agreement is called into question . . . the Board's expertise need not be invoked." *Goclowski v. Penn Central Transp., Co.*, 571 F.2d 747, 756 (3rd Cir. 1977).

Amtrak's assertion that the Pennsylvania Supreme Court was without jurisdiction to determine the scope of jurisdiction of the RAB confuses the distinction between the jurisdiction of a state court and the federal pre-emption of state law. Once Amtrak asserted in its post-trial exceptions that the state courts lacked jurisdiction to adjudicate Respondents' claims because they were within the exclusive jurisdiction of the RAB, the state courts *were obliged* to address this question in order to determine whether the verdicts could stand. Amtrak's argument in essence is that the state courts were without jurisdiction to address a question which Amtrak presented to them for resolution in order to invalidate the verdicts against it. The jurisdiction of the RAB being exclusive as to matters within its province, the state courts were of necessity required to address this question to determine their own jurisdiction. Amtrak's reliance in advancing this argument on *Order of Railway Conductors of America v. Pitney*, 326 U.S. 561 (1945) is misplaced. That case involved a railroad reorganization in which an interpretation of two collective bargaining agreements was sought to resolve a

jurisdictional dispute between two accredited bargaining representatives. It was precisely because the resolution of the dispute required interpretation of the collective bargaining agreements that this Court held that the District Court, in the exercise of its equitable discretion, "should not have interpreted the contracts" but should have "exercised[d] equitable discretion to give [the RAB] the first opportunity to pass on the issue." 326 U.S. at 567[9]

---

9. *Slocum v. Delaware, Lackawana & Western Railroad Co., supra,* applied the rationale of *Pitney* to deny to a state court jurisdiction to adjudicate a declaratory judgment action brought by a railroad to determine a jurisdictional dispute between two competing bargaining representatives under separate collective bargaining agreements. In *Slocum* this Court noted again, at 339 U.S. 242, that the dispute could not be resolved except by interpreting the two collective bargaining agreements, a function entrusted by Congress to the exclusive jurisdiction of the RAB. In so ruling, the Court was careful to note that the result was in no sense inconsistent with *Moore v. Illinois Central R.R.*, 312 U.S. 630 (1941), since "A common-law . . . action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees." While *Moore v. Illinois Central R.R. Co.*, holding that a discharged railroad employee had the option to either proceed before the RAB to seek reinstatement on the basis that his discharge was in violation of the collective bargaining agreement or to accept his termination and seek compensatory damages pursuant to local common law if he could demonstrate his discharge was wrongful, was overruled in *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972), this is of no relevance to the case at bar. The ruling in *Andrews* was premised upon a recognition that the very concept of "wrongful discharge" implies some modification of the traditional common-law rule that employment contracts are terminable at will. Since it was conceded by the employee in *Andrews* that the only source of his right to continued employment was the collective bargaining agreement between his union and the carrier, his claim depended upon interpreting the collective bargaining agreement to provide him with a right to continued employment. It was under these circumstances that this Court declared that "His claim is therefore subject to the Act's requirement that it be submitted to the Board for adjustment."

Amtrak cites *Choate v. Louisville & Nashville R.R.*, 715 F.2d 369 (7th Cir. 1983), *Beers v. Southern Pacific Transp. Co.*, 703 F.2d 425 (9th Cir. 1983) and *Goclowski v. Penn Central Transp. Co.*, 571 F.2d 747 (3rd Cir. 1977) to support its argument that Respondents' claims are within the exclusive jurisdiction of the RAB. These cases are readily distinguishable from the case

2. The court below adjudicated claims separate and apart from those which the Railroad Adjustment Board had considered and rejected.

To the extent that Amtrak is arguing the preclusive effect of the RAB's determination, the resolution of this argument by this Court would be inappropriate. Rule 1030 of the Pennsylvania Rules of Civil Procedure requires that affirmative defenses, including specifically the defense of *res judicata*, be pleaded in a responsive pleading under the heading "New Matter," and Rule 1032 provides, with certain exceptions not here applicable,

---

at bar. *Choate* and *Beers* involved actions for the intentional infliction of emotional distress following the discharge of the plaintiffs. In determining that their claims were within the exclusive jurisdiction of the RAB, the courts observed that their complaints concerning improper disciplinary procedures could be resolved only by reference to the provisions in the collective bargaining agreements governing discipline, and since their claims required interpretation of the collective bargaining agreements, under the rule announced in *Andrews v. Louisville & Nashville R.R.* they were within the exclusive jurisdiction of the RAB. *Goclowski*, on the other hand, delineates the line of separation between disputes involving the interpretation of provisions in a collective bargaining agreement, which are within the exclusive jurisdiction of the RAB, and disputes which can fairly and properly be resolved independent of the collective bargaining agreement, which remain subject to resolution in judicial forums based upon common law principles. The plaintiffs there sought to invalidate an agreement reached between their union and their carrier-employer on two separate grounds: first, that the agreement was an unauthorized extension of the collective bargaining agreement and, second, that it required ratification by the union membership in order to become effective. The District Court granted summary judgment against them on both claims on the basis that they were within the exclusive jurisdiction of the RAB. In reversing, the Court of Appeals determined that while the District Court was correct in its resolution of the first claim, which required scrutiny of the collective bargaining agreement and therefore deference to the expertise of the RAB in construing collective bargaining agreements, the District Court was required to resolve the second claim because:

> "[It] involves a simple contractual principle attacking the formation of a contract. The law applicable to such a claim is ordinary common law. Thus it appears that no interpretation of any provision of any collective bargaining agreement is called into question and that the Board's expertise need not be invoked. . . . [citing *Felter v. Southern Pacific Co.*, 359 U.S. 326 (1959)]" 571 F.2d at 756.

that a party waives all defenses which he does not properly plead. Citing those rules, the Pensylvania Supreme Court in *Posternack v. American Cas. Ins. Co. of Reading*, 421 Pa. 21, 218 A.2d 350, 351 (1966) ruled that "The . . . defense [of *res judicata*] . . . is affirmative in nature and must be pleaded, otherwise it is waived." To the same effect, see *Saitta v. Bankers Indemnity Ins. Co.*, 172 Pa.Super. 641, 95 A.2d 375, 377 (1953).

Amtrak never pleaded the defense of *res judicata*, and indeed even in its post-trial exceptions to the verdicts against it, it asserted only that the trial court lacked subject matter jurisdiction over the dispute. Amtrak never sought leave to amend its pleadings to assert the defense of *res judicata*, and under these circumstances consideration of Amtrak's argument on this point would be inappropriate. *Edelman v. California*, 344 U.S. 357 (1953).[10]

In any event, Amtrak's argument on this point ignores the fundamental difference between the claims asserted in this common law action by Respondents and the grievances they presented to the RAB. Their claims before the RAB were for specific enforcement of their individual contracts of employment to require their reinstatement to the supervisory positions from which they were demoted. In resolving Respondents' claims, the Board was obliged to measure any rights asserted by them arising from those individual contracts of employment against the competing rights to the promotional positions which the collective bargaining agreement afforded to other members of the bargaining unit. It was compelled to deny Respondents' grievances upon determining that their individual contracts conflicted with the collective bargaining agreement. The case at bar, however, is a simple common law action seeking compensatory damages for Amtrak's breach of its contractual promises to Respondents, the resolution of which required no reference

---

10. While the opinions of the trial court and the Superior Court inappropriately considered the binding effect of the RAB's determination under these circumstances (A-19-20, A31 to Petition), the Pennsylvania Supreme Court appropriately ignored it. Its passing reference to the denial of Respondents' claims by the RAB was clearly directed to the jurisdictional question rather than the question of claim preclusion (A-6 to Petition).

whatever to the collective bargaining agreement. The significance of this distinction, ignored by Amtrak in its argument on this point, has of course been recognized by this Court. *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *J.I. Case v. NLRB*, 321 U.S. 332 (1944).

It is axiomatic that the "claim preclusion" branch of *res judicata* does not apply to claims which were beyond the jurisdiction of the original forum. Restatement, Judgments 2d §§26(1)(c) and 83(1). As stated in Comment g to §83, analyzing the question of claim preclusion as applied to determinations made by administrative agencies:

> ". . . preclusion is inapplicable to that part of a claim that is a possible basis for a second action where 'the plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the competency of the [tribunal]. . . ."

While the RAB has jurisdiction to award money damages in the form of compensatory back pay if and when it determines that the discharge, suspension or demotion of an employee was in violation of the terms of a collective bargaining agreement, it has no jurisdiction to consider claims arising totally apart from the collective bargaining agreement and founded upon common law principles. *Slocum v. Delaware, Lackawanna & Western R.R.*, 339 U.S. at 244. Indeed, its expertise does not extend and is irrelevant to the issues presented by the instant action, the resolution of which required reference to local common law principles. *Goclowski v. Penn Central Transp. Co.*, 571 F.2d at 756.

In determining the Respondents' grievances, the RAB did not even have occasion to address any of the three issues which were integral to Respondents' claims for breach of contract under the common law of Pennsylvania, *viz.* whether Amtrak did in fact enter into individual contracts of employment with Respondents, whether it breached those contracts, and whether Respondents suffered damages as a result. Those issues were of no concern to the RAB in the exercise of its jurisdiction.

Accordingly, the "issue preclusion" branch of *res judicata* is equally unavailing to Amtrak. Restatement, Judgments §27.

3. The test for pre-emption applied by the Pennsylvania Supreme Court was consistent with that announced in Allis-Chalmers v. Lueck.

It should first be observed that Amtrak is arguing that the test for pre-emption applied in *Allis-Chalmers v. Lueck, 471 U.S. 202 (1985)* controls in the case at bar for the first time in its Petition for a Writ of Certiorari. It never cited to the Pennsylvania Supreme Court that case or the test it applied. Amtrak's argument on this issue is therefore inappropriate. *Illinois v. Gates*, 416 U.S. 213, 218-22 (1983).

Assuming it were appropriate to consider the question, the pre-emption test applied by the Pennsylvania Supreme Court was consistent with the test applied in *Allis-Chalmers v. Lueck*. In that case, this Court determined that if an element of a claim under local law requires consideration and interpretation of the terms of a collective bargaining agreement, it is pre-empted by Section 301 of the Labor Management Relations Act, 29 U.S.C. §185(a). The claim there involved, asserted under the common law of Wisconsin against the plaintiff's employer for bad faith in the handling of disability benefits, was held to be pre-empted by §301. In making that determination, this Court embarked upon a detailed analysis of that tort as developed by the Wisconsin courts to determine that it could not be established under Wisconsin law except by reference to the contractual relationship between the promisor-insurer and the promisee-insured. As such, the nature of the tort was "tightly bound with questions of contract interpretation . . .", since "The parties' agreement as to the manner in which a benefit claim would be handled will necessarily be relevant to any allegation that the claim was handled in a dilatory manner." Because the insurance provision involved in that case was contained in a collective bargaining agreement, this Court observed that unless federal common law governed the resolution of the plaintiffs' claim, the meaning of

the insurance provision in the collective bargaining agreement would be subject to varying interpretations according to the common law involved and would thus "frustrate the federal scheme" favoring uniformity in the interpretation of collective bargaining agreements. It was only after undertaking this scrutiny of the nature of the tort under the common law of Wisconsin that this Court determined that the claim was "inextricably intertwined with consideration of the terms of the labor contract" and "substantially dependent" upon anaylsis of its terms so as to be pre-empted by §301.

Concededly, the Pennsylvania Supreme Court did not discuss *Allis-Chalmers v. Lueck*,because Amtrak never cited that case to it. In asserting that the test for pre-emption applied by the Pennsylvania Supreme Court contravened the test announced in *Allis-Chalmers v. Lueck*, Amtrak ignores the specific determination made by the Pennsylvania Supreme Court that:

> "These contracts are separate from the collective bargaining agreement and do not affect it. In spite of Amtrak's breach of Appellants' individual contracts, the collective bargaining agreement still defines the employment relationship. In fact, we see no way that this claim would 'impair federal superintendence.' " (A-11-12 to Petition for Certiorari.)

In *Anderson v. Ford Motor Co.*, 803 F.2d 953, 956 (8th Cir. 1986) the court, in applying the pre-emption test announced in *Allis-Chalmers v. Lueck*, echoed the Pennsylvania Supreme Court in the case at bar in concluding that:

> "Conversely, however, state rules that proscribe conduct or establish rights and obligations independent of a labor contract are outside the pre-emptive scope of §301."[11]

---

11. The case at bar, it is respectfully submitted, would clearly not be pre-empted even if the standard for pre-emption applied in *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1369-70 (9th Cir.), *cert. den'd* 439 U.S. 930 (1978) were applied. Thus, Respondents' claims clearly are lacking a "not insubstantial" or "arguable" relationship to the collective bargaining agreement.

In the case at bar, Amtrak sought out the Respondents and solicited them with promises of permanent supervisory positions, promises which it could not fulfill because they conflicted with the terms of a collective bargaining agreement by which it was bound but to which Respondents were total strangers. The RAB specifically determined that Amtrak could not properly extend such promises because of the conflicting terms in the collective bargaining agreement, and it has been judicially determined that Amtrak did in fact extend them. Respondents' claims are for compensatory damages occasioned by Amtrak's breach of those promises. Amtrak is thus placed in the anomalous position of arguing that Respondents' claims based upon Amtrak's contractual promises to them must be resolved by the very terms of the collective bargaining agreement which served to render Amtrak's conduct improper. This argument is not even remotely related to the rulings of this Court in *Allis-Chalmers v. Lueck* or *Andrews v. Louisville & Nashville R.R.* As clearly appears from the verdicts entered by the trial court and approved by the Pennsylvania Supreme Court, Respondents' entitlement to damages for breach of contract under the common law of Pennsylvania required only a showing that Amtrak extended contractual promises to them, that it breached those promises, and that as a result Respondents suffered damages. No reference whatever to the collective bargaining agreement was necessary or appropriate for the resolution of Respondents' claims. Amtrak attempts to assert the collective bargaining agreement, which was the precise factor rendering improper its conduct in extending promises inconsistent therewith to Respondents, to bar Respondents' claims based upon its breach of those promises. This agrument would render the studied analysis by this Court in *Allis-Chalmers v. Lueck*, demonstrating that under the common law of Wisconsin the plaintiffs' claims could not be established without reference to the collective bargaining agreement and its interpretation, a totally useless exercise.

4. In determining that the individual contracts of employment extended to Respondents by Amtrak were separate from the collective bargaining agreement and were thus "outside of the collective bargaining agreement's scope" and "do not affect it," the Pennsylvania Supreme Court correctly relied upon *Belknap, Inc. v. Hale* to support the viability of Respondents' claims under the common law of Pennsylvania.

An obvious concern to the Pennsylvania Supreme Court was to insure that the relief afforded to Respondents not conflict with the determination made of Respondents' grievances by the RAB or with any other question of concern to the RAB. In making this determination, *Belknap, Inc. v. Hale* was by analogy appropriate. In that case, as here, workers were offered and accepted permanent positions of employment. There, as here, the workers were subsequently removed from those positions. In *Belknap*, the striking workers' claim to the jobs would be paramount to those of the replacement workers if the strike was in response to an unfair labor practice committed by the employer. An unfair labor practice charge brought by the striking workers against the employer was in fact settled pursuant to an agreement between the employer and the union representing the striking workers which required the employer to reinstate the striking workers. In permitting the assertion of common law actions for damages based upon the employer's breach of its individual contracts of employment with the replacement workers, this Court observed that a critical inquiry was "Whether the controversy presented to the state court is identical with that which could be presented to the Board."

There, as here, the employer argued that its agreement with the union insulated it from the claims asserted under local common law for breach of contract. In language particularly appropriate to the case at bar, this Court observed at 463 U.S. 507 that:

> "[The employer argues] that the contracts are not only not specifically enforceable but also may be breached free from liability for damages. We need not address the former issue

> — the issue of specific performance — since the Respondents ask only damages. As to the damages issue, as we have said above, such an argument was rejected in *J.I. Case*."

In language again particularly appropriate to the case at bar, this Court observed that while the state court could not mandate specific performance of the contracts of employment made with the replacement workers, since such a remedy would interfere with the competing rights of the striking workers and thus impinge upon the jurisdiction of the NLRB:

> ". . . even had there been no settlement and the Board had ordered reinstatement of what it held to be unfair labor practice strikers, the suit for damages for breach of contract could still be maintained without in any way prejudicing the jurisdiction of the Board. . . . The interests of the Board and the NLRA, on the one hand, and the interest of the state in providing a remedy to its citizens for breach of contract, on the other, are 'discrete' concerns. . ." 463 U.S. at 512.

The principles announced in *Belknap v. Hale* were obviously appropriate for consideration by the Pennsylvania Supreme Court in determining whether an award of damages to Respondents would in any sense conflict with the RAB's determination that they were not entitled to specific performance of Amtrak's contractual promises of permanent supervisory positions in the face of the competing rights to occupy such positions which the collective bargaining agreement afforded to other members of the bargaining unit.

Amtrak argues that the Pennsylvania Supreme Court incorrectly resolved the issue left open in *Caterpillar v. Williams*, ___ U.S. ___, 107 S.Ct. 2425 (1987), an issue which it asserts is governed in its favor by *J.I. Case v. NLRB*. In addressing this argument, it is appropriate to recognize the significant distinction between the case at bar, on the one hand, and *Caterpillar* and *J.I. Case* on the other. In the case at bar, the individual contracts of employment were made with Respondents while they were total strangers to any employment relationship with

Amtrak and concerned hiring for positions within a bargaining unit covered by a collective bargaining agreement. Amtrak's conduct was wrongful toward Respondents precisely by virtue of the fact that it extended to them contractual promises which it was legally prohibited from fulfilling from the very moment those contractual promises were extended because of the conflicting provisions of the *pre-existing* collective bargaining agreement to which it was bound.

In both *Caterpillar* and *J.I. Case*, on the other hand, the individual contracts of employment were made in connection with positions not within a bargaining unit and not covered by any collective bargaining agreement. In *J.I. Case*, the contracts were entered prior to the formation of any collective bargaining agreement, while in *Caterpillar* the contracts were entered while the promisee-employees occupied managerial positions not covered by the collective bargaining agreement. In such a context, as observed by this Court in *Caterpillar v. Williams* at 107 S.Ct. 2432, an issue is raised whether by entering into the bargaining unit sometime thereafter, and thus becoming subject to a collective bargaining agreement with terms conflicting with their individual contracts, the employees waived their rights under the pre-existing individual employment contracts. In both *J.I. Case* and *Caterpillar* the contracts involved were in fact valid and enforceable when made, and an issue for consideration was their continued viability by virtue of the *subsequent* impact of the collective bargaining agreements, viz. whether the *subsequent* collective bargaining agreements superseded the individual contracts. That issue could not be resolved without reference to the collective bargaining agreement.

In *Caterpillar v. Williams*, the sole issue raised in the appeal to this Court was whether the plaintiffs' state court action was removable to the federal district court under the "complete pre-emption" exception under §301 to the general principle that the removability of a state court action is to be determined solely by reference to the plaintiff's Complaint. This Court's observation that it was intimating no views on the ultimate pre-emption issue was made in recognition of the fact that this issue was not before the Court in that its determination that the case was not

removable required resolution of the pre-emption issue in the first instance by the state court. This observation concerning the ultimate pre-emption question cannot fairly be read to imply any question concerning the continued viability of state court actions which have a basis completely independent of the collective bargaining agreement. This was made clear by the statement there at 107 S.Ct. 2431-32, that:

> ". . .[in] *J.I. Case* the Court . . . held:
>
> > 'Individual contracts cannot subtract from collective ones, and whether under some circumstances they may *add* to them in matters covered by the collective bargain, we leave to be determined by appropriate forums under the law of contracts applicable. . . .'
>
> . . . individual employment contracts are not inevitably superseded by any *subsequent* collective bargaining agreement covering an individual employee, and claims based upon them may arise under state law. *Caterpillar's basic error is its failure to recognize that a plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights independent of that agreement including state-law contract rights, so long as the contract relied upon is not a collective bargaining agreement.* See *Allis-Chalmers, supra*." (emphasis supplied)

5. There is no conflict among the circuit courts and the state courts on the issue presented by the case at bar.

In addressing the analysis of the various circuit court and state court opinions presented in Amtrak's Petition for Certiorari, it is perhaps most appropriate to begin by focusing on the issue presented by the case at bar. It does not involve claims asserted by individuals arising out of individual contractual promises made by their employer while they occupied positions not covered by an existing collective bargaining agreement, promises which were valid and enforceable when made, where the issue for resolution is whether they continue to be enforceable at a point in time when the employees subsequently accept

positions covered by the collective bargaining agreement. This was the issue presented by *Caterpillar v. Williams*.

The case at bar similarly does not involve the continued viability of individual contracts of employment in the face of a collective bargaining agreement subsequently negotiated by a bargaining representative designated to represent a bargaining unit of which the employee involved becomes a member, where the issue arises concerning a bargaining representative's authority to enter into collective bargaining agreements which adversely impact upon rights previously enjoyed by certain parties. This was the issue presented by *J.I. Case v. NLRB* and *Lewellyn v. Fleming*, 154 F.2d 211 (10th Cir.), *cert. den'd*, 329 U.S. 715 (1964).

The case at bar likewise does not involve the efficacy of individual contracts with an employer entered by employees while they are covered by a collective bargaining agreement. This requires consideration of the impact upon such contracts of the employees' participation in the employer's unfair labor practice in avoiding the bargaining representative and dealing directly with members of the bargaining unit.

The case at bar presents a claim arising out of contractual promises extended to Respondents by Amtrak at a point in time when they occupied positions of employment elsewhere and were not only not covered by Amtrak's collective bargaining agreement but total strangers to any employment relationship with it. Respondents' claims are based upon contractual promises extended to them under circumstances where from the very moment the promises were made by Amtrak it was prohibited from fulfilling them by virtue of the conflicting provisions in a controlling collective bargaining agreement.

Finally, the case at bar does not present a claim for specific enforcement of Amtrak's contractual undertakings so as to entitle Respondents to occupy the supervisory positions promised them, the claim which was presented to the RAB and which involves consideration of the priority between the Respondents' rights to those positions and the competing rights of other members of the bargaining unit as provided in the governing

collective bargaining agreement. The case at bar presents a simple claim for money damages to compensate Respondents for the significant financial losses sustained by them by virtue of their reliance upon and Amtrak's breach of the contractual promises it extended to them under the circumstances of this case.[12]

Amtrak argues that the Writ of Certiorari which it seeks should be granted to resolve a conflict among the circuit courts and state supreme courts on the issue presented by this case. As supportive of its position, it cites *Eitmann v. New Orleans Public Service*, 730 F.2d 359 (5th Cir.), *cert. den'd*, 469 U.S. 1018 (1984); *McKinney v. Int'l Ass'n of Machinists*, 624 F.2d 745 (6th Cir. 1980); and *Lewellyn v. Fleming*, 154 F.2d 211 (10th Cir.), *cert. den'd*, 329 U.S. 715 (1946). Amtrak asserts that these cases are in conflict with *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986); *Varnum v. Nu-Car*, 804 F.2d 638 (11th Cir. 1986); and *Bubbel v. Wien Air Alaska, Inc.*, 682 P.2d 374 (Sup. Ct. Alaska 1984).

Respondents submit that even considering the question presented by the case at bar in the broadest possible sense, the decisions of this Court in *Allis-Chalmers v. Lueck* and *Belknap v. Hale* have resolved it in clear terms. The three cases which Amtrak acknowledges are consistent with the decision of the Pennsylvania Supreme Court in the case at bar were all decided subsequent to *Belknap v. Hale*, while of the three cases which Amtrak argues are inconsistent, only *Eitmann v. New Orleans Public Service* was decided subsequent to *Belknap*. That case, however, is readily distinguishable from the case at bar and is in no sense inconsistent with *Anderson v. Ford Motor Co.*, *Varnum v. Nu-Car* or *Bubbel v. Wien Air Alaska*.

---

12. While the Pennsylvania Supreme Court in its opinion inadvertently made a passing reference to Respondents' claims being "for breach of individual employment contracts *and misrepresentation*" [A-2 to Petition], Respondents in their Complaint filed in state court sought relief only for breach of contract, and the verdicts of the trial court and its opinion clearly demonstrate that it awarded relief solely for breach of contract (A-28-36 to Petition).

In *Eitmann v. New Orleans Public Service*, the plaintiff's complaint alleged that at the time he was hired by the defendant as an overhead linesman, he was advised that due to the hazardous nature of their work, overhead linesmen received full pay during any period of partial or total disability until retirement. The plaintiff further averred that after being disabled as a result of an injury on the job he was ultimately discharged. The governing collective bargaining agreement had a grievance procedure which culminated in binding arbitration to determine whether discharges were "for cause". The plaintiff did not follow the grievance procedure but instead filed suit in state court asserting a common law cause of action. The case was removed to the federal district court which entered summary judgment for the defendant. The plaintiff's complaint did not allege that the governing past practice between the defendant employer and its overhead linemen employees was not in fact as represented to him when he was hired. In affirming the entry of summary judgment the court noted that to the extent the plaintiff's complaint was based upon the past practice, *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) makes clear that such past practices, comprising the "industrial common law" on matters not explicitly covered by the collective bargaining agreement, are nonetheless part of the collective bargaining agreement and thus enforceable pursuant to its grievance procedure. As such, the court declared:

> "Where, as here, an employee who is covered by a collective bargaining agreement seeks to redress a grievance subject to its terms, and seeks a remedy awardable by the arbitrator, we think it is clear that his avenue lies in the procedure provided by the collective bargaining agreement."

Because the plaintiff in *Eitmann v. New Orleans Public Service* was not asserting that the "past practice" was contrary to the representations made to him by the defendant-employer, his claim was based upon and governed by the collective bargaining agreement. It was precisely for this reason that a claim based upon common law was inappropriate, as observed by the

Eleventh Circuit, in distinguishing *Eitmann* in its opinion in *Varnum v. Nu-Car Carriers, Inc.*

In addition, it should be pointed out that neither *McKinney v. Int'l Ass'n of Machinists* nor *Lewellyn v. Fleming* is inconsistent with the decision of the Pennsylvania Supreme Court in the case at bar or with the cases which Amtrak acknowledges support Respondents' position. In *McKinney v. Int'l Ass'n of Machinists*, the plaintiffs sought *injunctive* relief to enforce their individual contracts of employment at the expense of other members of the bargaining unit who were promoted pursuant to the collective bargaining agreement. It thus presented the same issue which was properly presented to and resolved by the RAB in the case at bar.[13]

Lewellyn v. Fleming, on the other hand, is not even remotely relevant to the issue presented by the case at bar. There the plaintiff relied upon a past practice which prevailed for many years from the time he was employed until 1938 when, pursuant to the Railway Labor Act, his railroad employer entered into a collective bargaining agreement with a union representing a bargaining unit of which he was a member. The collective bargaining agreement provided for a change in the past practice. There was no issue in that case of any contractual promise extended by the employer to the plaintiff in connection with his employment, and the case raised only the authority of a bargaining representative to negotiate changes in terms of employment, whether established by past practice or prior collective bargaining agreements. The court simply recognized a bargaining agent's authority to make "contracts which may have unfavorable effects on some members of the craft

---

13. The rational for this category of cases is seen in *Brown v. American Airlines, Inc.*, 593 F.2d 652 (5th Cir. 1979) where the court observed, in connection with the plaintiff's claim for specific enforcement of his agreement with the carrier:

> "If the agreement were enforced, it would affect the rights of other employees under the collective bargaining agreement. To allow Brown to return to his former position without loss of seniority would necessarily change the status of those currently working at that job. Thus, the settlement of this dispute seriously implicates the CBA."

represented."[14]

There is thus no conflict among the decisions of the circuit courts and state courts which would be resolved by a decision of this Court in the case at bar.

---

14. Amtrak in its Petition also avers that in *Bale v. General Telephone Co.*, 795 F.2d 755 (9th Cir. 1986) the Ninth Circuit arrived at a conclusion opposite to that in *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928 (9th Cir. 1986) *aff'd* U.S. , 107 S. Ct. 2425 (1987). In making this assertion, Amtrak ignores a crucial distinction between the cases. *Williams v. Caterpillar Tractor Co.*, like the case at bar, involved a simple common law action for breach of contract. In *Bale v. General Telephone Co.*, on the other hand, the only claims before the Ninth Circuit were common law claims of fraud and negligent misrepresentation arising out of promises allegedly extended to the plaintiffs by their employer at the time of hire which were in conflict with terms of the collective bargaining agreement. It was precisely because the court determined that to prevail the plaintiffs would be compelled to demonstrate that the collective bargaining agreement, properly interpreted, "differed significantly from the individual employment contracts they believed they had made" that it concluded that their claims were therefore "substantially dependent upon analysis of the terms" of the collective bargaining agreement and thus pre-empted by §301, pursuant to the rationale of *Allis-Chalmers v. Lueck*.

While the Eighth Circuit in *Anderson v. Ford Motor Co.* perceived some conflict between its holding and that in *Bale v. General Telephone Co.*, there is in fact a significant distinction between the two cases. While both cases involved tortious conduct by the employer, in *Anderson v. Ford Motor Co.* the misrepresentation asserted by the plaintiffs was not a promise conflicting with the terms of the collective bargaining agreement. The collective bargaining agreement concededly established a preferential hiring list. The plaintiffs, as former employees of Ford, were admittedly aware of this provision. The misrepresentation involved a statement of fact by the employer independent of the collective bargaining agreement, that the preferential hiring list had been exhausted, when in fact it had not. No interpretation of the collective bargaining agreement was necessary to prove this misrepresentation, unlike the one asserted in *Bale*. Assuming some conflict between *Anderson v. Ford Motor Co.* and *Bale v. General Telephone Co.* however, the case at bar would not be an appropriate vehicle to resolve it, since Respondents here did not assert or obtain relief for misrepresentation, a tort under Pennsylvania law. They asserted and obtained relief solely for breach of contract.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania be denied.

Respectfully submitted,

Alexander A. Di Santi*
John M. Gallagher, Jr.
RICHARD, DI SANTI, HAMILTON,
GALLAGHER & PAUL
25 West Second Street
P.O. Box 900
Media, Pennsylvania 19063
(215) 565-4600
Counsel for Respondents

*Counsel of Record